85-181

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

COLLINS COMPANY, INC., a/k/a THE COLLINS COMPANY, INC. OF DELAWARE, CASTLE CONSTRUCTION COMPANY, INC., a/k/a ALABAMA CASTLE CONSTRUCTION COMPANY, and ALGERNON BLAIR, INC.
Petitioners,

v.

TECTONICS, INC. OF FLORIDA and FOREST BUILDERS, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Submitted by:
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QUESTION PRESENTED

WHETHER THE SMALL BUSINESS ACT, 15 U.S.C. § 631, et seq., OR THE FEDERAL CONSTITUTIONAL SUPREMACY CLAUSE PREEMPTS A STATE REMEDY IN A DIVERSITY JURISDICTION ACTION FOR UNLAWFUL INTERFERENCE WITH BUSINESS RELATIONSHIP, UNJUST ENRICHMENT, AND FRAUD AND DECEIT IN A CASE BROUGHT BY THE SECOND LOW BIDDER AGAINST THE LOWEST AND SUCCESSFUL BIDDER ON A SMALL BUSINESS ADMINISTRATION SET ASIDE CONTRACT?

LIST OF PARTIES

The caption of this case, as reflected in the petition for a writ of certiorari and in this brief in opposition thereto, contains the names of all such parties.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
Cort v. Ash, 422 U.S. 66 (1975)	7
Iconco v. Jensen Const. Co., 622 F. 2d 1291 (8th Cir., 1980)	7,10,12
Royal Services, Inc. v. Maintenance, Inc. 361 F. 2d (5th Cir. 1966)	6,8,12
Silkwood v. Kerr-McGee Corp. ___U.S.___, 104 S. Ct. 615, 1984	7
Tectonics, Inc. of Florida v. Castle Const. Co., 753 F. 2d. 957 (11th Cir., 1985)	7

CONSTITUTIONS AND STATUTES

	PAGE
U.S. Const. Art. VI.....	1
15 U.S.C. § 631 et. seq.....i,1,10	
15 U.S.C. § 644	8
13 C.F.R. § 121, 3-5 (1984) ..	8

OPINIONS BELOW

The opinion of the Court of Appeals reversing the judgment of the District Court and remanding for further proceedings is reported at 753 F.2d 957 (11th Cir. 1985).

JURISDICTION

Petitioner asserts jurisdiction of this Court under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. U.S. Const. art. VI
2. 15 U.S.C. §§ 631-637 (1976)

STATEMENT OF THE CASE

In February 1982 Tectonics, Inc of Florida and Forest Builders, Inc. (Tectonics) filed a complaint in the Southern District of Florida against Castle Construction, The Collins Company and Algernon Blair, Inc. with regard to the bidding on a small business set aside contract. Jurisdiction was based on diversity of citizenship. The defendants succeeded in an attempt to remove the case to Alabama where the District Court dismissed the case for failure to state a claim upon which relief could be granted.

The United States Corps of Engineers issued an invitation for bids on a contract for construction at Red Stone Arsenal in Alabama. The invitation was limited to bids from small

businesses as defined by the Federal statute just mentioned. Tectonics, Inc. of Florida and Forest Builders, Inc. as joint venturers certified that they were small business within the statute and were the second lowest bidder for the construction contract. The defendant Collins Company, Inc. (Collins) gave a similiar certificate to the Corps and was the successful bidder on the contract. Tectonics did not make a bid protest because it had relied upon Collins' misrepresentation that it was a small business. Later, as a result of a protest filed by another company regarding a different construction contract the Small Business Administration (SBA) decided that Collins was not a small business, as defined by Federal law. After becoming aware of this determination, Tectonics filed its

complaint.

The complaint alleged that defendants Castle Construction Company, Inc. and Algernon Blair, Inc. provided eighty percent (80%) of Collins' original capitalization, indemified the surety under the performance and bid bonds provided employees to provide the bid estimates, and placed their corporate officers as directors of Collins. The complaint alleged that the defendants by so doing fraudulently misrepresented Collins as a small business and thereby prevented Tectonics from being the successful bidder of the contract. The complaint seeks recovery on theories of fraud and deceit, unjust enrichment, and interference with a business relationship, and seeks compensatory and punitive damages.

The petition for a writ of Certiorari was filed following the United States Court of Appeals for the Eleventh Circuit's reversal of the judgment of the District Court and remand for further proceedings.

REASONS FOR DENYING THE WRIT

Petitioners have asserted as reasons for granting the writ that the Court of Appeals' decision interferes with the effective administration of the small business set aside program and with the Federal procurement process. We disagree.

First, plaintiffs did not allege a private cause of action under the Small Business Act. This was clearly prohibited by Royal Services, Inc. v. Maintenance, Inc., 361 F.2d 86 (5th Cir. 1966).

Plaintiffs alleged separate state causes of action for damages against the low, successful bidder of the Small Business Administration set aside contract. This was allowed in

Iconco v. Jensen Const. Co., 622 F. 2d 1291 (8th Cir., 1980) and Tectonics, Inc. of Florida v. Castle Const. Co., 753 F. 2d 957 (11th Cir., 1985).

Neither the Small Business Act nor the United States Constitution, Article 6 preempts plaintiffs' state causes of action against petitioners. This Court has recognized that there are some situations in which a federal private cause of action does not exist to parties injured as a result of the violation of the federal statute involved therein, but has held that it was entirely appropriate for the plaintiffs to seek any remedy created by state law. Cort v. Ash, 422 U.S. 66 (1975); Silkwood v. Kerr-McGee Corp., ____ U.S. ____, 104 S. Ct. 615 (1984).

The Small Business Act was passed

by Congress to aid, counsel, assist and protect the interest of small businesses. Royal, 361 F. 2d at 92. To effect the purposes of the act, the Small Business Administration and the contracting procurement or disposal agency are required to give small businesses preferential treatment with respect to "set aside" contracts. See 15 U.S.C. § 644. Bidders are also permitted to challenge the status of any other bidder by filing a written protest with the government contracting office within the appropriate time limits. See 13 C.F.R § 121.3-5 (1984).

The Eleventh Circuit Court of Appeal's examination of the statutory scheme and legislative history of the Small Business Act, lead it to conclude "that Congress did not intend to occupy

the entire field of small business concerns to the extent that all state remedies would be forclosed for either the statute nor applicable regulations expressly preclude state action in this field or dictate preemption". We agree with the Court of Appeals in this case. There is no expressed preclusion of state law causes of actions in either the Act or the implementing regulations.

Plaintiffs state law remedies do not conflict with Small Business Act nor do they constitute obstacles to the accomplishment of the purposes and objectives of the act. As indicated earlier, the policy of the Act is to encourage free competition and the development of small businesses, and to insure that small businesses receive a fair proportion of government contracts.

See 15 U.S.C. § 631. Another "primary goal [is] to assure that government contracts [are] performed in a timely and competent manner". Iconco v. Jensen Construction Co., 622 F. 2d 1291, 1298 (8th Cir., 1980).

Allowing this suit to proceed will be consistent with and promote the achievement of the goals and policies of the Act. If a contract set aside for small business has been performed by a business that is not small, the intent of Congress has not been advanced. Allowing an unsuccessful bidder to recover on unjust enrichment and fraud theories, when the proof justifies such recoveries, is consistent with the salutary purpose of the Act. Iconco at 1298.

Respondents do not contend that state law relief is permissable under all circumstances. For example, respondents do not argue that a party seeking an injunction to stop the performance of a goverment contract is entitled to relief under state law. The critical issue is whether the maintenance of the state law cause of action will be disruptive to the full performance of an established government contract. That issue is not before this Court in this case. The petitioners have not established that the cause of action will effect the performance of this contract. As the Eleveth Circuit noted in its opinion in this case, "Speculation that the maintenance of the action will either alter the contractual obligations between the appellees and the government or prevent the contract from being

fully completed is not sufficient to deny the sufficiency of plaintiffs' complaint.

Petitioners argument that the maintenance of the state cause of action for a violation of a federal law would disrupt the bidding process, is based on pure speculation. As noted in Iconco v. Jensen Construction Co., supra, "[t]he mere threat of legal action without more, is not sufficient...to discourage either the submission of bids or the acceptance of a contract award" Id. at 1299. "The only effect of a judgment for the plaintiff is to deprive [the] defendant of benefit which... Congress never intended it to have" Id.

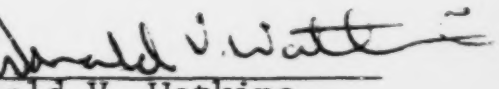
CONCLUSION

For the foregoing reasons, it

is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Brief In Opposition to the Petition For Writ of Certiorari on the

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following attorneys of record by depositing a copy of same in the United States Mail, postage prepaid, addressed to each at their regular mailing address:

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Done this 29th day of August, 1985.

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